

**LUND LAW, PLLC**  
Attorney At Law

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HB 198

Hertha L. Lund  
502 South 19<sup>th</sup>, Ste. 102  
Bozeman, Montana 59718  
Direct: 406.586.6254  
Fax: 406.586.6259  
[Lund@Lund-Law.com](mailto:Lund@Lund-Law.com)

**House Federal Relations,  
Energy & Telecommunications Committee  
January 12, 2011  
Testimony Against HB 198:  
(on behalf of) Landowners for Fair  
Condemnation Procedures**

Dear Chairman Klock & Members of the Committee:

I am here today representing Larry Salois, the man who is legal guardian of his mother, whose property that MATL attempted to condemn, and more than 20 other landowners who are personally dealing with the issues related to HB 198. Collectively, my clients are called "Landowners for Fair Condemnation Procedures." On behalf of my clients, I urge you to vote no on HB 198 for the following reasons.

- 1. Jobs, Jobs, Jobs:** I understand that this is the mantra here at the Legislature, one which my clients and I support. However, it seems the only job that HB 198 will secure is for attorneys who represent landowners to protect their constitutional rights. As written, this bill will subject the public utilities and private merchant lines to years of litigation because the bill would violate the Montana and United States Constitutions.
- 2. Constitutional Protections:** Both the Montana and United States Constitutions provide numerous protections for property owners.

**No person shall ... be deprived of ... property  
without due process of law, nor shall private  
property be taken for public use without just**

**compensation. Fifth Amendment to the United States Constitution.**

**Private property shall not be taken or damaged for public use without just compensation. Article II, Section 29, of the Montana Constitution.**

**No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of laws. Fourteenth Amendment to the United States Constitution.**

**All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in lawful ways. Article II, Section 3, of the Montana Constitution.**

**No person shall be deprived of life, liberty, or property without due process of law. Article II, Section 17, of the Montana Constitution.**

**3. HB 198 Violates Due Process Rights:** This bill would violate landowners' due process rights because landowners would not be provided actual notice, a hearing regarding their property rights, and other necessary due process protections provided by the United States and Montana Constitutions. The United Supreme Court has discussed the need for procedural protections for interests in property. *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) the Supreme Court discussed equal protection, due process and takings and the Court asserted that property-related

takings claims are subject to greater scrutiny than other due process and equal protection claims which relate to non-property economic interests. *Id.* at 3147.

The Montana Supreme Court has held, "The guarantee of due process has both a procedural and substantive component. Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action." *Englin v. Board of County Commissioners, Yellowstone County*, (2002) 310 Mont. 1, 4, 48 P.3d 39, 42 citing *Newville v. State, Dept. of Family Services*, (1994), 267 Mont. 237, 249, 883 P.2d 793, 800. In *Newville*, the Court stated, that the essence of the substantive due process analysis was that "the state cannot use its power to take unreasonably, arbitrary or capricious action against an individual." *Newville*, 267 Mont. at 250, 883 P.2d at 801 citing *Raisler v. Burlington N. Ry. Co.* (1985), 219 Mont. 254, 263, 717 P.2d 535, 541.

If the Legislature makes MFSA super-controlling, then it would deprive landowners of property and process rights afforded by the Montana and United States Constitutions. In Mrs. Salois case, she was never provided actual notice, the opportunity to be heard, and the opportunity for a hearing regarding her property during the MFSA process. According to Bob Williams, MATL's past Vice-President of Regulatory Affairs, the route going through Mrs. Salois' property was changed in the final MFSA process. Mrs. Salois was not provided knowledge of where the line might go until the MFSA process was complete. MFSA did not and cannot provide adequate due process protections to comply with the Montana and United States Constitutions.

**4. HB 198 Would Provide Less Process for Money Making Entities to Condemn Property Than the State Must Follow:** In order to condemn property, the State of Montana must provide very specific information and follow a very specific process to condemn private property. The Montana Supreme Court stated:

a unanimous Court stated clearly and without equivocation that  
't]he legislature's grant of eminent domain power . . . must be

strictly construed.' (citation omitted) Because private real property ownership is a fundamental right under the Montana Constitution, "any statute which allows [the taking of] a person's property must be given its plain interpretation, favoring the person's fundamental rights." (citation omitted). *McCabe Petroleum Corp. v. Easement and Right-of-Way Across Township 12 North, Range 23 East, PMM* (2004), 320 Mont. 384 ¶ 14, 386. 87 P.3d 479, ¶ 14 (citing *City of Bozeman*, 264 Mont. 76, 869 P.2d 790).

Therefore, the Legislature cannot grant a public utility or private entity the right to condemn property by utilizing a statute such as MFSA, which was not created to protect constitutional property rights, without providing the same or more process than the State must follow to condemn private property.

**5. MFSA Does Not Provide Adequate Constitutional Protection for Private Property:** HB 198 would eviscerate the current constitutional protections for private property. Currently, the State, or an entity granted condemnation authority by the Legislature, cannot take property unless the use is a public use, and the condemnor proves that public use in a Court proceeding, after adequate notice to the landowner and the filing of a condemnation action. Nowhere does MFSA provide that protection for private property owners. In fact, the landowner would not have any specific notice that his property was being targeted for a taking until years after the public process that was specifically developed by the Legislature for environmental review.

The Montana Supreme Court stated:

[W]hile the Siting Act [MFSA] provides the procedure for obtaining approval to construct a major facility, **it does not provide a mechanism for the acquisition of specific tracts of property on which to build the facility. The property must be obtained through condemnation proceedings under laws of eminent domain.** *Montana*

*Power Company v. Fondren* (1987), 226 Mont. 500, 506, 737 P.2d 1138, 1142.

MFSA's stated purpose is to meet the constitutional obligations of Article II, Section 3 and Article IX of the Montana Constitution. These are the constitutional protections for a right to clean and healthy environment. MFSA does not state that its purpose is to provide constitutional protection for due process rights, Article II, Section 17, or protection for private property rights, Article II, Section 29. Therefore, this quick fix would violate other constitutional protections.

**6. Retroactive Section of HB 198 is also Unconstitutional** – The last section of the bill that would make the law retroactive so that any entity that received a MFSA certificate since September 30 of 2008, can now condemn property without affording a property owner any constitutional protection for their private property rights. Obviously, this would have specific retroactive damage to Mrs. Salois' constitutional rights. The Legislature is prohibited from passing retroactive legislation that adjudicates property issues between individuals without providing constitutional protections.

**7. The Department of Environmental Quality Cannot Determine Constitutional Issues:** The Montana Supreme Court has stated: "Constitutional questions are properly decided by a judicial body, not an administrative official, under the **constitutional** principle of separation of powers. Art. III, Section 1, 1972 Mont. Const. *Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 109, 765 P.2d 745, 748 (citing *Jarussi v. Board of Trustees* (1983), 204 Mont. 131, 135-36, 664 P.2d 316, 318). Therefore, DEQ cannot provide a process under MFSA that determines the constitutional questions provided in Montana Code Ann. § 70-30-111. (See pg. 14 of Public Benefits and Private Rights: Countervailing Principles of Eminent Domain).

**8. Montanans Have Historically and Currently Objected to Condemnation of Property for Economic Development:** In 2007, in response to the *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the

Legislature passed a law to prevent condemnation for urban development. Specifically, the Legislature amended Montana Code Ann. § 70-30-102 (12) to provide:

private property may be acquired for urban renewal through eminent domain only if the property is determined to be a blighted area, ..., and may not be acquired for urban renewal through eminent domain if the purpose of the project is to increase government tax revenue.

Since 1972 and the Constitutional Convention, Montana has discouraged use of eminent domain for purposes of economic development. In the case of *City of Helena v. DeWolf* (1973), 508 P.2d 122, 162 Mont. 57, the Montana Supreme Court refused to allow condemnation for an urban renewal project. In another case, the Court held that the Bozeman Chamber of Commerce could not benefit from the State's condemnation. *Vaniman v. City of Bozeman* (1995), 271 Mont. 514, 898 P.2d 1208.

HB 198 would treat rural landowners different than urban landowners because it would allow eminent domain for purpose of economic development. Also, just recently the Great Falls Tribune polled people and more than 85% (555 votes were cast) stated that they did not believe that private entities that are awarded a MFSA permit should be able to condemn another's private property. Citizens do not want the Legislature to provide eminent domain authority to condemn rural landowners' farm and ranchland.

### **Conclusion:**

During the 1993 and 1995 Legislatures, I spent lots of time assisting the then-Speaker of the House, Hal Grinde, pass legislation that would require the government to "Look Before it Leaped" before it took private property. The Republicans strongly supported that bill to protect private property rights. It is a strange twist of the times, that now we have a bill that would enhance a private entity's or public utility's power to condemn private property. The times in Montana are not so dire that we need to pass

legislation that harms basic Constitutional protections for Montana's farmers and ranchers.

This quick fix would create more harm than good. It would raise many constitutional questions; keep attorneys employed for quite some time; and would not assist timely development of Montana's natural resources because of the numerous lawsuits that would be spawned from the legislation.

There are better ways to fix the problem, if one exists. On behalf of my clients, I am ready and willing to work with all parties to develop a solution that is surgical, precise and would not violate the United States and Montana Constitutions.

On behalf of Montana Landowners for Fair Condemnation Procedures, I ask you to **vote NO** on HB 198. Thank you for this opportunity to provide comments and please contact me if I can be of any assistance to the Committee.

Sincerely,

Hertha L. Lund